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17 CFR Ch. I (4-1-01 Edition)

except another member of that contract market.

(Approved by the Office of Management and Budget under control number 3038-0007)

(Secs. 2(a)(1), 4c(a)-(d), 4d, 4f, 4g, 4k, 4m, 4n, 8a, 15 and 17, Commodity Exchange Act (7 U.S.C. 2, 4, 6c(a)-(d), 6f, 6g, 6k, 6m, 6n, 12a, 19 and 21; 5 U.S.C. 552 and 552b); secs. 5(a)(11), 17(b)(10) and 8a(5) of the Commodity Exchange Act, as amended, 7 U.S.C. 7a(11), 21(b)(10) and 12a(5))

[41 FR 42942, Sept. 29, 1976, as amended at 46 FR 63036, Dec. 30, 1981; 47 FR 57020, Dec. 22, 1982; 48 FR 22142, May 17, 1983]

§ 180.2 Fair and equitable procedure.

Every contract market shall adopt rules which provide for a fair and equitable procedure through arbitration or otherwise for the settlement of customer's claims and grievances against any member or employee thereof which shall include at least the following as *minimum* requirements for a fair and equitable procedure:

(a) The procedure shall be objective and impartial. Customers must be provided with the choice of a panel or other decision-maker composed of one or more persons, of which at least a majority are not members or associated with any member of a contract market, or employee thereof, and are not otherwise associated with a contract market. The rules of a contract market may, with proper notice, require the customer to request such a panel or other such decision-maker at the time of submission of the claim or grievance to the procedure. *Ex parte* contacts by any of the parties with members of any panel or other decision-maker shall not be permitted.

(b) The procedure shall grant each of the parties the right, if desired, to be represented by counsel, at his own expense, in any aspect of the procedure.

(c) The procedure shall provide for the prompt settlement of claims or grievances and counterclaims, if any (permitted by §180.4 of this part). Unnecessary or unreasonable delay by any of the parties shall not be permitted.

(d) The procedure shall require adequate notice to the parties and opportunity for a prompt hearing as follows:

(1) Each of the parties shall be entitled personally to appear at such hearing, unless the contract market shall

have adopted a procedure for the written submission of claims or grievances (and any counterclaims applicable thereto) which in the aggregate do not exceed \$5,000. If the claim or grievance (and any counterclaim applicable thereto) in the aggregate does not exceed \$5,000, provision may be made for the claim or grievance to be resolved without a hearing through a submission on the basis of written documents, unless a hearing is required by the panel or other decision-maker or by rule.

(2) The formal rules of evidence need not apply at the hearing. Nevertheless, the procedures established may not be so informal as to deny due process. Each party must be given adequate opportunity to prepare and present all relevant facts in support of the claims and grievances, defenses or counterclaims (permitted by §180.4 of this part), and to present rebuttal evidence to such claims or grievances, defenses or counterclaims made by the other parties.

(3) Each party shall be entitled to examine other parties and any witnesses appearing at the hearing and to examine all relevant documents presented in connection with the claim or grievance, defense or counterclaim applicable thereto.

(4) A verbatim record of the hearing may be required, the cost of which must be reasonable. There shall be no requirement that a verbatim record be transcribed unless requested by a party who shall bear the cost of the transcription, and contract markets shall otherwise seek to minimize the cost associated with such record.

(e) The procedure shall provide adequate notice to the parties in advance of a submission of a claim or grievance, or counterclaim (permitted by §180.4 of this part), of the nature and amount of any fees or costs which may be assessed against customers utilizing the procedure. Fees or costs shall be reasonable, particularly in relation to the complexity and amount of the claim or grievance or counterclaim, if any, presented. Costs may be apportioned among the parties or may be assessed against the losing party as the panel or other decision-maker, in its discretion,

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sees fit. The rules of a contract market, however, must provide that a contract market member which is a party to an arbitration proceeding shall pay any incremental fees which may be assessed by a qualified forum for provision of a panel or other decision-maker which conforms to the requirements of paragraph (a) of this subsection, unless the arbitrators in a particular proceeding determine that the customer has acted in bad faith in initiating or conducting that proceeding.

(f) The procedure shall provide that the settlement award shall be rendered promptly in writing and be final. There shall be no right of appeal to any entity within the contract market which can overturn the settlement-procedure decision; the only right of appeal being as provided under applicable law.

(g) The procedure shall not impose any restrictions on the jurisdiction or venue of any court to enforce an award so rendered.

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(Secs. 5(a)(11), 17(b)(10) and 8a(5) of the Commodity Exchange Act, as amended, 7 U.S.C. 7a(11), 21(b)(10) and 12a(5))

[41 FR 27523, July 2, 1976, as amended at 46 FR 63036, Dec. 30, 1981; 48 FR 22142, May 17, 1983; 57 FR 46093, Oct. 7, 1992]

§ 180.3 Voluntary procedure and compulsory payments.

(a) The use by customers of the dispute settlement procedures established by contract markets pursuant to the Act or this part or of the arbitration or other dispute settlement procedures specified in an agreement under paragraph (b)(3) of this section shall be voluntary. The procedures so established shall prohibit any agreement or understanding pursuant to which customers of members of the contract market agree to submit claims or grievances for settlement under said procedures prior to the time when the claim or grievance arose, except in accordance with paragraph (b) of this section.

(b) No futures commission merchant, introducing broker, floor broker, commodity pool operator, commodity trading advisor, or associated person shall enter into any agreement or understanding with a customer in which the customer agrees, prior to the time the

claim or grievance arises, to submit such claim or grievance to any settlement procedure except as follows:

(1) Signing the agreement must not be made a condition for the customer to utilize the services offered by the futures commission merchant, introducing broker, floor broker, commodity pool operator, commodity trading advisor or associated person.

(2) If the agreement is contained as a clause or clauses of a broader agreement, the customer must separately endorse the clause or clauses containing the cautionary language and provisions specified in this section. Such futures commission merchant or introducing broker may obtain such endorsement as provided in § 1.55(d) of this chapter for the following classes of customers only:

(i) An investment company registered under the Investment Company Act of 1940;

(ii) An insurance company subject to regulation by any State;

(iii) A bank, trust company or any other such financial depository institution subject to regulation by any State or the United States;

(iv) A pension plan subject to title I of the Employee Retirement Income Security Act of 1974, an employee welfare benefit plan subject to the fiduciary responsibility provisions of the Employee Retirement Income Security Act of 1974, and a plan defined as a government plan in section 3(32) of title I of the Employee Retirement Income Security Act of 1974;

(v) A foreign entity that is regulated in a manner comparable to the entities specified in paragraphs (b)(2)(i)-(iv) of this section; or

(vi) A person who is a "qualified eligible person" as defined in § 4.7(a) of this chapter.

(3) The agreement may not require the customer to waive the right to seek reparations under section 14 of the Act and part 12 of these regulations. Accordingly, the customer must be advised in writing that he or she may seek reparations under section 14 of the Act by an election made within 45 days after the futures commission merchant, introducing broker, floor broker, commodity pool operator, commodity trading advisor or associated